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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 550

GORDON KEITH DENNY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of Circuit Judge Kerner (R. 282–286), the concurring opinion of District Judge Lindley (R. 286–287), and the dissenting opinion of Circuit Judge Minton (R. 287–290) are not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 30, 1947 (R. 290). The petition for a writ of certiorari was filed January

26, 1948. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a district court may authorize the correction of a typographical error in a count of an indictment, consisting of a mistyping of the initial letter of the defendant's surname, without requiring that the indictment be resubmitted to the grand jury.

2. Whether, assuming that a defendant's conviction on one count of an indictment is inconsistent with his acquittal on another count, the conviction is nevertheless sustainable.

STATEMENT

Count 1 of a three-count indictment (R. 1–2) filed in the District Court for the Northern District of Indiana, charged that petitioner and five others conspired to cause the transportation of stolen goods in interstate commerce with knowledge of their stolen character. Count 2 charged the same defendants with committing the substantive offense. The third count did not concern petitioner, and need not be considered.

In both the caption and the first count of the indictment, petitioner's name correctly appeared as "Gordon Keith Denny". In the second count,

however, his name was misspelled "Gordon Keith Kenny". Petitioner filed a motion to dismiss the second count on the ground that he was not and never had been known as "Gordon Keith Kenny" (R. 3). The Government thereafter filed a verified petition to amend count 2 by substituting the name "Denny" for "Kenny"; the petition alleged that "the reference to the person the Grand Jury indicted as Gordon Keith Kenny was a stenographic mistake, the stenographer who was drawing the indictment inadvertently striking the letter 'K' instead of the letter 'D,' and that the person the Grand Jury was indicting for the offense set forth in the second count of the indictment is one and the same person as the Gordon Keith Denny referred to in Count I of the said indictment" (R. 4). Petitioner's motion to dismiss was denied, the Government's petition to amend was granted (R. 5), and count 2 was amended accordingly (R. 6). Petitioner's subsequent motion to dismiss the amended indictment on the ground that it was not the indictment found by the grand jury (R. 6–8) was denied (R. 9).

Following a trial by jury, petitioner was found not guilty on count 1 and guilty on count 2 (R. 265–266). A motion in arrest of judgment (R. 266–269), in which petitioner renewed his objection to the amended indictment and in which he also alleged inconsistency in the verdict, was

denied (R. 269), and petitioner was sentenced to five years' imprisonment and fined $5,000 (R. 270).

On appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment of conviction was affirmed (R. 290), one judge dissenting on the sole ground that it was error to try petitioner on an amended indictment (R. 287–290).

ARGUMENT

1. Petitioner contends that he was deprived of his right under the Fifth Amendment[1] by the action of the trial court in permitting the Government to amend the indictment without resubmitting it to the grand jury for their approval (Pet. 21–32). The contention is without merit. The amendment permitted was for the purpose of correcting an obvious typographical error. Petitioner's full name—Gordon Keith Denny—correctly appeared in both the caption and the first count of the indictment. In the second count, the initial letter of his surname was erroneously typed "K" by the stenographer who typed the indictment.[2] In substance, therefore, the amendment in no way changed the indictment found by the grand jury, but merely corrected a stenographer's typing error. 18 U. S. C. 556 pro-

[1] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *."

[2] Petitioner did not, and does not, controvert this statement in the Government's verified petition to amend count 2.

vides that "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant".[2] From this it is clear that, even if the error had not been corrected, petitioner's conviction would be unassailable. *Capriola* v. *United States,* 61 F. 2d 5, 11–12 (C. C. A. 7), certiorari denied, 287 U. S. 671; cf. *Faust* v. *United States,* 163 U. S. 452, 454. "Common sense and judicial precedent, alike, sustain the view that indictments are not subject to attack simply because of a mistake in the spelling or the initials of one of the parties." *Capriola* v. *United States, supra,* at p. 12. Plainly, therefore, correction of the inaccuracy in the interest of technical perfection was permissible. *United States* v. *Fawcett,* 115 F. 2d 764, 765–767 (C. C. A. 3); *United States* v. *Empire Hat & Cap Mfg. Co.,* 47 F. Supp. 395, 401 (E. D. Pa.).

In *Ex parte Bain,* 121 U. S. 1, cited by petitioner in support of his contention, there had been a substantive amendment of an indictment to pre-

[2] See also 28 U. S. C. 391, providing that "* * * On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties".

vent an adverse ruling on demurrer. As this Court observed in *Salinger* v. *United States,* 272 U. S. 542, 549, "In the case of *Ex parte Bain* * * * there was an actual amendment or alteration of the indictment to avoid an adverse ruling on demurrer, and the trial was on the amended charge without a resubmission to a grand jury. The principle on which the decision proceeded is not broader than the situation to which it was applied."[4] The *Bain* decision, therefore, cannot successfully be invoked to condemn the action of the trial court in this case. The Fifth Amendment has a higher purpose than to proscribe correction of an obvious misnomer in a single count of an indictment, arising not from any error on the part of the grand jury, but from a typist's mistake.

2. Petitioner's only other contention—that his conviction on count 2 cannot stand because it is inconsistent with his acquittal on count 1 (Pet. 32–44)—is equally without merit. It is well settled that consistency in a verdict is not necessary, each count in an indictment being regarded as if it were a separate indictment. *Dunn* v. *United States,* 284 U. S. 390, 393; *Borum* v.

[4] We see nothing in Rule 7 (d) of the Federal Rules of Criminal Procedure, relied upon by petitioner (Pet. 27–32), to indicate that this Court, in promulgating the Rule, was of the view that the principle on which the *Bain* decision proceeded was, contrary to the quoted statement in the *Salinger* case, broader than the situation to which it was applied.

United States, 284 U. S. 596; *Stein* v. *United States,* 153 F. 2d 737, 744 (C. C. A. 9), certiorari denied, 328 U. S. 834; *United States* v. *Capone,* 93 F. 2d 840, 841 (C. C. A. 7), certiorari denied, 303 U. S. 651; *Crichton* v. *United States,* 92 F. 2d 224, 227 (App. D. C.), certiorari denied, 302 U. S. 702; *Long* v. *United States,* 90 F. 2d 482, 484 (C. C. A. 9), certiorari denied, 302 U. S. 730; *Carroll* v. *United States,* 16 F. 2d 951, 954 (C. C. A. 2), certiorari denied, 273 U. S. 763; cf. *United States* v. *Dotterweich,* 320 U. S. 277, 279.[5] It is unnecessary, therefore, to examine the merits of the contention that the acquittal on the conspiracy count logically required acquittal on the substantive count as well because, allegedly, the only controverted issue under each count was petitioner's knowledge of the stolen character of the goods in question.

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this

[5] *Sealfon* v. *United States,* No. 174, decided January 5, 1948, does not question this well-settled rule, as petitioner contends (Pet. 43–44). That case involved a trial and conviction of a substantive offense on the aider and abettor theory following the accused's acquittal of conspiracy to commit the offense. The facts relied on in the first trial to establish the alleged conspiracy were essentially the same as those relied on in the second trial to establish the aiding and abetting. The decision was based on the principle of *res judicata.*

Court. We therefore respectfully submit that it should be denied.

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